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First English Evangelical Lutheran Church v. County of Los Angeles: Compensation for Temporary Takings

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NOTES

First English Evangelical Lutheran Church v. County of Los Angeles: Compensation for Temporary Takings

A church owned a retreat center and recreational area for handicapped children. The buildings at the retreat center were destroyed by a flood in 1978. The county where the property was located adopted an ordinance which temporarily prohibited any construction or reconstruction in the "interim flood protection area" until flood control measures could be implemented. The church's property fell within the protection area, and therefore the ordinance prohibited any reconstruction of the retreat center. The county justified the ordinance as necessary "for the immediate preservation of the public health and safety" and made it effective immediately upon adoption.[1]

One month after the ordinance was adopted, the church filed suit against the county. Alleging that the prohibition on reconstruction deprived the church of all use of its property, the church sought monetary damages in inverse condemnation for loss of use. The trial court granted the county's motion to strike part of the allegations on the grounds that monetary damages are not available as a remedy for land use regulations that violate the taking clause of the fifth and fourteenth amendments.[2] The California Court of Appeals upheld the trial court's decision, and the California Supreme Court denied review. The United States Supreme Court reversed. *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987).

The Supreme Court held that the church was entitled to the opportunity to prove the damage claim. If the church could establish that the county's ordinance amounted to a taking within the meaning of the fifth amendment, then it had to be compensated for the time during which the "taking was effective."[3] One implication of this holding is the Court's approval of a monetary damages remedy for excessive land use regulations that violate the taking clause before being judicially declared unconstitutional.

The opinion carefully restricts its holding to a situation where a regulation deprives the landowner of all beneficial use, but numerous questions remain unanswered. Logically, the damages remedy should

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1. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2381-82 (1987).
2. Id. at 2382.
3. Id. at 2389.

apply to all types of regulatory takings. Are there regulatory takings that do not deprive the landowner of all beneficial use of his property? How should damages be calculated for a temporary taking? When do damages begin to accrue? Will the imposition of a damages remedy have any effect on the formulation of regulatory policy at the municipal level? Will the effects of the remedy be desirable?

This note explores the constitutional and practical implications of the *First English* holding and addresses the questions summarized above. It begins by examining the background of the jurisprudence concerning regulatory and temporary takings. An analysis of *First English* follows. The concluding section examines the implications of the decision and the criticisms that have been lodged against the damages remedy in taking cases.

BACKGROUND OF TAKINGS

The fifth amendment of the United States Constitution provides that the federal government may take private property only for public use and only upon providing "just compensation."[4] This restriction applies to state governments and their agencies through the fourteenth amendment.[5] There are at least three ways in which a land use regulation might deprive a person of the rights granted and protected by these two amendments. First, the process by which the regulation is enforced may deprive the landowner of procedural due process rights. Second, a regulation may deprive him of substantive economic due process rights. Finally, a regulation may deprive a property owner of ownership rights to the extent that the regulation is identified as a taking of property.

In early land use regulation cases, the court was mainly concerned with procedural fairness.[6] One early opinion went so far as to say "it is not possible to hold that a party has without due process of law, been deprived of his property, when . . . he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."[7] But near the turn of the century,

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4. "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

5. "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 17 S. Ct. 581 (1897), is cited in the modern taking cases as incorporating the compensation clause into the fourteenth amendment.

6. 2 R. Rotunda, J. Nowak, J. Young, Treatise on Constitutional Law: Substance and Procedure § 15.11 at 129.

7. Davidson v. New Orleans, 96 U.S. 97, 105 (1877).

the court began to examine the "'substance' as well as the form of such a taking," holding that the due process clause required that the property be taken for public use and that compensation be paid.[8]

The United State Supreme Court has long recognized that a temporary physical occupation and use of private property by the government is a taking within the meaning of the just compensation clause of the fifth amendment.[9] During the 1940's, the Court recognized that the appropriation and use of private property by the United States government during World War II was a taking, and therefore the property owners were entitled to compensation even though the taking was temporary. In these cases, the government occupation and use occurred during specific time periods. As a result, the beginning and the end of the taking was easily established, and the main problem for the Court was determining the proper measure of damages.[10] As originally conceived, the concept of a taking probably included only physical appropriation, invasion and use.[11] Today, it is clear that "non-acquisitive governmental action may amount to a taking in a constitutional sense."[12]

A regulatory taking claim is an action for relief that is based on the contention that the effect of a regulation is unconstitutional because it deprives the complainant of his property without compensating him for his loss. These claims arise because an exercise of police power, such as a land use regulation or other type of restriction,[13] can exceed a constitutional limit.[14] In *Pennsylvania Coal Co. v. Mahon*,[15] Justice Holmes in a now famous and oft-quoted passage declared that "if a

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8. *Chicago, B & Q R.R. Co.*, 166 U.S. at 234-35, 17 S. Ct. at 583-84. See also Rotunda, supra note 6, § 15.11 at 129.

9. Kimball Laundry Co. v. United States, 338 U.S. 1, 65 S. Ct. 1434 (1949); United States v. Petty Motor Co., 327 U.S. 372, 66 S. Ct. 596 (1946); United States v. General Motors Corp., 323 U.S. 373, 655 S. Ct. 357 (1945).

10. *Kimball Landry*, 338 U.S. at 4-21, 69 S. Ct. at 1437-45; *Petty Motor*, 327 U.S. at 377-81, 66 S. Ct. at 599-601; *General Motors*, 323 U.S. at 379-84, 65 S. Ct. at 360-62.

11. 2 R. Rotunda, J. Nowak, J. Young, Treatise on Constitutional Law: Substance and Procedure § 15.12 at 130.

12. Id.

13. Penn Central Transp. Co. v. New York, 438 U.S. 104, 98 S. Ct. 2646 (1978) (preservation of landmarks); Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S. Ct. 987 (1962) (prohibition on mining below water table); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114 (1926) (zoning ordinance); Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273 (1887) (prohibition on the manufacture of beer).

14. Kaiser Aetna v. United States, 444 U.S. 164, 100 S. Ct. 383 (1979) (limitation on owner's right to exclude others found unconstitutional); Nectow v. City of Cambridge, 277 U.S. 183, 48 S. Ct. 447 (1928) (zoning ordinance found unconstitutional as applied); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158 (1922) (Pennsylvania statute regulating the mining of coal found unconstitutional).

15. 260 U.S. 393, 43 S. Ct. 158 (1922).

regulation goes too far it will be recognized as a taking."[16] Unfortunately, he did not define precisely what he meant by "too far." Several commentators have stated that Justice Holmes felt that the "distinction between a taking and regulation is one of degree"[17] and that "the police power and eminent domain exist in a continuum."[18] Therefore, Holmes concluded, each case must be decided on its "particular facts."[19]

In the 65 years since *Pennsylvania Coal*, the Court has found itself unable to develop a "set formula" for determining which land use regulations are so excessive as to constitute a taking.[20] One reason for the Court's failure is that different types of regulations produce different types of adverse effects. For each different effect, some threshhold limit must be established beyond which a regulation will be recognized as a taking. A regulation that results in a permanent physical occupation is per se a taking regardless of the size or quantity of space that is occupied.[21] In an analogous way, a regulation that deprives the landowner of all, or substantially all, of the value or use of his property constitutes a taking.[22] These two tests measure similar effects. If a part of the property is physically occupied, then the owner is deprived of all use of that space.

In addition to takings claims, land use regulations are also subject to a second form of constitutional attack. If a landowner's use of or value in the property is only hindered or restricted, without physical invasion and occupation, and the effect is something less than a deprivation of all use or value, then the approach has been to use a substantive due process balancing test. Like all private property regulations, they must satisfy the minimal requirements of the due process clause. This constitutional standard requires a court to consider the public interest, the means chosen to achieve the goal, and the economic effect on the landowner, but it provides only a minimum level of judicial scrutiny.[23] In order to justify an uncompensated diminution in the value of a person's property, the governmental body imposing the regulation must show that there is a legitimate purpose for the regulation and that the regulation bears a rational relationship to the accomplishment of

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16. Id. at 415, 43 S. Ct. at 160.

17. Rotunda, supra note 7, § 15.12, at 132.

18. Id. at 133.

19. 260 U.S. at 413, 43 S. Ct. at 159.

20. Justice Brennan admitted this in *Penn Central*, 438 U.S. at 124, 98 S. Ct. at 2659.

21. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164 (1982); see also Rotunda, supra note 8, § 15.12, at 139-40.

22. Berger, A Policy Analysis of the Taking Problem, 49 N.Y.U. L. Rev. 165, 175-77 (1974).

23. *Penn Central*, 438 U.S. at 124, 98 S. Ct. at 2659.

that goal or purpose. Generally, if there is a legitimate state purpose and if "the means chosen are reasonably necessary to the accomplishment of the purpose, and not unduly oppressive upon individuals," then the regulation does not constitute a taking.[24] Courts have held that regulations may destroy or adversely affect "recognized real property interests"[25] and may prohibit the most beneficial use of the property when the public interest is sufficiently strong.[26] Therefore, the greater the economic injury to the landowner, the stronger the public interest required to avoid violating the due process clause.

To evaluate the extent of the landowner's injury, the court determines whether the regulation unduly "frustrates distinct investment-backed expectations."[27] In the interest of fairness and economic efficiency, an individual who purchases property with the intent to develop should not be unduly penalized by regulations imposed after the purchase and which the purchaser did not expect and could not have foreseen prior to the purchase. It is desirable for decision-makers to possess all relevant information before an investment decision is made.[28] When a developer purchases a particular piece of property, there is a given set of assumptions reflected in the purchase price. An expectation of future use restrictions would result in a lower purchase price than if there were no expected future use restrictions.

If the government knew that it would be required to pay compensation in order to impose a particular use restriction, then it would weigh more carefully the expected benefits that should result from the new regulation. In other words, the compensation that must be paid to

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24. *Goldblatt*, 369 U.S. 590, 595, 82 S. Ct. 987, 990 (1962). (quoting Lawton v. Steele, 152 U.S. 133, 137, 14 S. Ct. 499, 501 (1894)).

25. *Penn Central*, 438 U.S. at 125, 98 S. Ct. at 2659.

26. Id. at 127, 98 S. Ct. at 2660. See also *Goldblatt*, 369 U.S. 590, 82 S. Ct. 987 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114 (1926); Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273 (1887).

27. *Penn Central*, 438 U.S. at 127, 98 S. Ct. at 2661. The Supreme Court appeared to use a two-part inquiry in weighing the merits of Penn Central's claim. The Court had first decided that the regulation in question was not invalid because the City's objective was neither arbitrary nor unconstitutionally discriminatory.

The second inquiry was "whether the interference with appellants property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" Id. at 136, 98 S. Ct. at 2665. The opinion stated that the answer to this question depends on the "severity of the impact of the law on appellants' parcel." Id. The Court held that compensation was not required because Penn Central was not precluded from obtaining a "reasonable return" on its investment, was not precluded from all beneficial use of their property, and because Penn Central's losses were mitigated by the right under New York zoning regulations to transfer their development rights to nearby parcels which they also owned. Id. at 130-37, 98 S. Ct. 2661-66.

28. Berger, supra note 22, at 197-98.

the landowner will be considered in light of the expected benefits that would accrue to the public. This should insure that the benefits from the new regulation will meet or exceed the costs of the sacrificed development plus the cost of compensation. Compensation provides a mechanism by which the costs of the regulation are distributed to the public in general and not borne by individual landowners.[29]

In determining the extent of economic injury, the "nature of the interference with rights in the parcel as a whole" is also important.[30] The regulation cases differ from the physical occupation cases in one important respect. A regulation that completely destroys the value in only one part or segment of the property or only one right or privilege associated with ownership, does not, thereby, automatically constitute a taking. Property rights are viewed as an aggregate and "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."[31]

Since each regulatory taking claim must be decided on a case-by-case basis, difficulties arise in determining when a taking by regulation occurs and, in the case of temporary takings, whether a taking has occurred at all.[32] Because each case must be decided on its own facts, it has been argued that a regulation that has violated the due process clause is not a taking and, therefore, not compensable until a court has determined that a taking has occurred and the regulating authority has decided to keep the regulation in force. However, the regulation may have reduced the value of the property to such an extent that the landowner has suffered adverse economic effects sufficient to find that the regulation constituted a taking even before the regulation is declared

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29. Id. at 216-18.

30. *Penn Central*, 438 U.S. at 130-31, 98 S. Ct. at 2662. See, e.g., Keystone Bituminous Coal Ass'n v. De Benedictis, 107 S. Ct. 1232, 1248 (1987); Andrus v. Allard, 444 U.S. 51, 65-66, 100 S. Ct. 318, 326-27 (1979).

31. *Andrus*, 444 U.S. at 65-66, 100 S. Ct. at 326-27.

32. Indeed government announcements that a particular parcel of property will be acquired at a future time through eminent domain proceedings can drastically reduce the value of the property between the date of the announcement and the date on which the property is acquired. To avoid this problem the Court has held that if the decline in market value is "substantial and unforeseeable" then the landowner should be compensated for the adverse economic effects of an announced governmental intention to condemn the property. Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 104 S. Ct. 2187 (1984). This case also holds that if there is a significant change in the value of the property between the time of the taking and the tender of payment by the government then interest must be paid on the value of the property from the date of the taking. See also Rotunda, supra note 8, § 15.14, at 152. Generally, the courts value the land at its "highest and best use."

invalid by a court.[33] But generally, diminutions in value due to government planning activities do not implicate the just compensation clause unless the purpose of the regulation is to depress land prices and thereby reduce the future costs of condemnation.[34]

Between 1928 and 1962, the United States Supreme Court largely abstained from consideration of regulatory taking claims involving state and local governments.[35] As a result, state courts developed much of the jurisprudence concerning remedies and did not necessarily apply federal constitutional standards.[36] The states have disagreed widely on the question of the proper remedy.[37] While actions in inverse condemnation[38] for damages have always been allowed in physical intrusion and occupation cases, this is not true of the regulatory taking cases. Arizona, California, and Connecticut allow only actions for mandamus or declaratory relief, limiting the remedy to an invalidation of the unconstitutional regulation.[39] Six states allow actions for invalidation as well as for damages.[40] Three states allow a damages remedy only

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33. Berger, supra note 22, at 216-18.

34. Justice Holmes wrote that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal*, 260 U.S. at 413, 43 S. Ct. at 159. See also Danforth v. United States, 308 U.S. 271, 60 S. Ct. 231 (1939) (legislation requiring future condemnation not a taking); Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138 (1980) (city preliminary planning activities do not constitute a taking).

35. Rotunda, supra note 11, § 15.12, at 135.

36. Id.

37. Comment, Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations, 29 UCLA L. Rev. 711, 717-19 (1982).

38. Inverse condemnation is defined as "[a] cause of action against a government agency to recover the value of property taken by the agency, though no formal exercise of the power of eminent domain has been completed." Black's Law Dictionary 740 (5th ed. 1979). The theory is that the aggrieved landowner whose property has been taken by the government is afforded the opportunity to force the government to buy those rights of which he has been deprived.

39. Davis v. Pima County, 121 Ariz. 343, 345, 590 P.2d 459, 461, (Ct. App.), cert. denied, 442 U.S. 942, 99 S. Ct. 2885 (1978); Agins v. City of Tiburon, 24 Cal. 3d 266, 276-77, 598 P.2d 25, 31, 157 Cal. Rptr. 372, 377-78 (1979), aff'd on other grounds, 447 U.S. 255, 100 S. Ct. 2138 (1980); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365, cert. denied, 425 U.S. 904, 96 S. Ct. 1495 (1975); DeMello v. Town of Plainville, 170 Conn. 675, 368 A.2d 71 (1976).

40. Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981); Clifton v. Berry, 244 Ga. 78, 259 S.E.2d 35 (1979); Village of Willoughby Hills v. Corrigan, 29 Ohio St. 2d 39, 278 N.E.2d 658, cert. denied, sub nom. Chongris v. Lorrigan, 409 U.S. 919, 93 S. Ct. 218 (1972); Prince George's County v. Blumberg, 44 Md. App. 79, 418 A.2d 1155, (1980), cert. denied, 449 US. 1083, 101 S. Ct. 869 (1981); City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978).

under certain circumstances.[41] For example, Colorado allows a damages remedy when cumulative administrative conduct works a taking.[42] Florida and Minnesota allow a damages remedy when invalidation cannot provide an effective remedy.[43] North Dakota allows a damages remedy when the regulation denies all beneficial use of the property.[44] The Texas Supreme Court allowed damages when the City of Austin repeatedly denied development permits.[45] In most cases where a damages remedy is not available, state courts have given the government the option of either rescinding the offending regulation or paying compensation to keep the regulation in force.[46]

The federal courts have been hesitant to declare federal regulations invalid when important public policies might be hindered.[47] Also, the Tucker Act[48] is viewed as a "congressional authorization for the payment of compensation when federal government activities damage private property rights."[49] For these reasons, the federal courts have been receptive to requests for compensatory relief from federal regulations. The question that remained was whether there was a federal constitutional basis for a damages remedy in an action for relief from an excessive regulation against state and local governments.[50]

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41. Hermanson v. Board of County Comm'rs, 42 Colo. App. 154, 595 P.2d 694 (1979); Moviematic Industries Corp. v. Board of County Comm'rs, 349 So. 2d 667 (Fla. Dist. Ct. App. 1977); Askew v. Gables-By-The-Sea, Inc., 333 So. 2d 56 (Fla. Dist. Ct. App. 1976); Minch v. City of Fargo, 297 N.W.2d 785 (N.D. 1980); Keystone Assocs. v. State, 39 A.D.2d 176, 333 N.Y.S.2d 27 (1972), aff'd, 33 N.Y.2d 848, 307 N.E.2d 254, 352 N.Y.S.2d 194 (1973).

42. *Hermanson*, 42 Colo. App. 154, 595 P.2d 694 (1979).

43. *Gables-By-The-Sea*, 333 So. 2d 56 (Fla. Dist. Ct. App. 1976), Holoway v. City of Pipestone, 269 N.W.2d 28 (Minn. 1978).

44. *Minch*, 297 N.W.2d 785.

45. City of Austin v. Teague, 570 S.W.2d 389, 395 (Tex. 1978).

46. Estuary Properties, Inc. v. Askew, 381 So. 2d 1126 (Fla. Dist. Ct. App. 1979), rev'd in part sub nom. Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981); Ventures in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979).

47. Comment, supra note 37, at 720. See also infra notes 54-58 and accompanying text.

48. 28 U.S.C. § 1491 (Supp. 1987) in part reads:

> The United States Claims Court shall have jurisdiction to render judgment upon any claims against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

49. Comment, supra note 37, at 720.

50. There is a statutory basis for damages under 42 U.S.C. § 1983. Lynch v. Household Finance Co., 405 U.S. 538, 543, 92 S. Ct. 1113, 1117 (1972), established that Congress intended to provide a federal forum for the redress of wrongful deprivation of property rights by persons acting under color of state law. Monell v. Dep't of Social Servs., 436 U.S. 658, 98 S. Ct. 2018 (1978), held that municipal corporations are persons for purposes of this statute.

The California Supreme Court refused to allow a damages remedy in *Agins v. City of Tiburon*.[51] The plaintiffs were seeking damages in inverse condemnation partly on the basis that they were deprived of all beneficial use of their property during the pendency of eminent domain proceedings.[52] The trial court dismissed the suit on the grounds that the California Supreme Court had previously indicated that declaratory relief was the proper and appropriate remedy where a landowner sought relief from a land use regulation.[53]

The California Supreme Court upheld the dismissal arguing that monetary damages were not a desirable or appropriate remedy for two reasons. First, it would be an improper and undesirable usurpation of legislative power for a court to order a state or local government to purchase property rights simply because a regulation was declared unconstitutional. The choice of purchasing the effected property rights or rescinding the regulation should be a matter of public policy and properly belongs to the legislature.[54]

Second, the court was concerned that the availability of an inverse condemnation remedy "would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary."[55] Fear that the public fisc would be injured by successful regulatory taking claims would deter local land use planners from implementing strict regulations. State and local legislative bodies would lose control over expenditures and financial planning would be difficult if not impossible.

The California court's legal argument was that a regulation which deprived the landowner of all use and enjoyment of his property but

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51. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979). Plaintiffs were the owners of five acres of unimproved but very desirable real estate. The City of Tiburon adopted an ordinance pursuant to a general comprehensive plan that limited the owners' development plans to the construction of not more than five single family dwellings. The City instituted and then abandoned eminent domain proceedings while leaving the ordinance in force. The plaintiffs were given $4500.00 for their legal expenses that resulted from the eminent domain proceedings. Not satisfied, the plaintiffs filed suit alleging that the ordinance constituted an unconstitutional taking of their property, and they asked for declaratory relief and $2 million damages in inverse condemnation.

52. Id. at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378.

53. State of California v. Superior Court 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974).

54. The Court believed that the decision to purchase property rights involves a comparison of the cost to purchase and the public benefits received as a result of that acquisition. Such policy decisions are the province of the legislature and not the judiciary. *Agins*, 24 Cal. 3d at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377.

55. Id.

did not provide for compensation was an invalid exercise of eminent domain. It was unreasonable, perhaps arbitrary, and an invalid exercise of police power. Such a regulation thus violated the due process clause, and judicially ordered compensation could not constitutionally rehabilitate the regulation. The landowner may not convert "an excessive use of the police power into a lawful taking" by suing for monetary relief through inverse condemnation proceedings.[56] Therefore, the only remedies available to the landowner were mandamus and declaratory relief.

Carried to its logical conclusion, this line of reasoning implies that an excessive or arbitrary regulation that violates the due process clause can never amount to a taking for which compensation must be paid if due process violations and taking clause violations are kept separate and distinct. It also implies that a land use regulation that violates the due process clause should only be compensated through section 1983 of Title 42 of the United States Code.[57]

This argument rests on the theory that Justice Holmes was speaking metaphorically in *Pennsylvania Coal* when he referred to excessive regulations as takings. Some of Justice Holmes' opinions which pre-date *Pennsylvania Coal* state that an overly restrictive regulation does not trigger an award of compensation, but is merely invalid.[58] In other words, Holmes did not mean that excessive regulations would fall within the scope of the just compensation clause. He merely used the word "taking" as a "shorthand symbol for the outer limit to valid exercises of the police power, beyond which point the government would have to resort to its eminent domain power to achieve its objective."[59] This approach also formed the basis of the New York Court of Appeals opinion in *Penn Central Transportation Co. v. New York*.[60]

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56. 24 Cal. 3d at 273, 598 P.2d at 30, 157 Cal. Rptr. at 375.

57. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordiance, regulation, custom, or usuage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, priviledges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In Monell v. Dept. of Social Servs., 436 U.S. 658, 98 S. Ct. 2018 (1978), the United States Supreme Court held that municipalities are persons for purposes of this statute.

58. Block v. Hirsch, 256 U.S. 135, 156, 41 S. Ct. 458, 459 (1921); Hudson County Water Co. v. McCarter, 209 U.S. 349, 355, 28 S. Ct. 529, 531 (1908); Martin v. District of Columbia, 205 U.S. 135, 139, 27 S. Ct. 440, 441 (1907).

59. Comment, supra note 35, at 714. See also Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108 (1985), where the Court included a description of this theory in the opinion but declined to comment on its validity because the claim was premature.

60. 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).

In *Agins*, the California Supreme Court also rejected the plaintiff's taking claim on the merits. The landowners were not entitled to declaratory relief because the regulation did not deprive them of all beneficial use of the land, nor did it "impermissibly decrease" the value of the property.[61] On appeal, the United States Supreme Court avoided the remedial issue by upholding the California Supreme Court's ruling that a taking had not occurred.[62]

The year after the Supreme Court's affirmance in *Agins*, Justice Brennan argued for a damages remedy in his dissent in *San Diego Gas & Electric Co. v. San Diego*.[63] The utility company was seeking damages in inverse condemnation for an alleged regulatory taking, but the California Supreme Court denied the request in light of *Agins*. The utility company appealed to the United States Supreme Court, arguing that California could not limit the remedy to mandamus or declaratory relief. The appeal was dismissed because the Court found that there had been no final judgment.[64]

Justice Brennan disagreed, finding that the California court's denial of monetary relief did indeed constitute a final judgment.[65] In the dissenting opinion, Justice Brennan proposed a constitutional basis for a damages remedy for a temporary regulatory taking. He rejected the state court holdings in *Agins* and *Penn Central*[66] that an invalid exercise of police power could not constitute a taking under federal constitutional law.[67] Justice Brennan wrote:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property . . . . It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking', and therefore a *de facto* exercise of the power of eminent

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61. 24 Cal. 3d at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378.

62. 447 U.S. 255, 261, 100 S. Ct. 2138, 2142 (1980). 63. 450 U.S. 621, 101 S.

62. 447 U.S. 255, 261, 100 S. Ct. 2138, 2142 (1980).

63. 450 U.S. 621, 101 S. Ct. 1287 (1981). In this case, the property owner's land was rezoned by the city, effectively preventing the utility from using the property for the purpose for which it was purchased. The property owner sought mandamus and declaratory relief as well as damages for inverse condemnation.

64. Id. at 630, 101 S. Ct. at 1293.

65. Id. at 645, 101 S. Ct. at 1300 (Brennan, J., dissenting).

66. The New York Court of Appeals had come to the same conclusion. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 329, 397 N.Y.S. 2d 914, 917, 366 N.E.2d 1271, 1274 (1977). That court held that there could be no taking since the regulation had not transferred control of the property to the city, but had only imposed a negative restriction on the use of the property.

67. *San Diego Gas & Electric*, 450 U.S. at 647, 101 S. Ct. 1302.

> domain, where the effects completely deprive the owner of all or most of his interest in the property.[68]

This language implies that a regulation may satisfy the fourteenth amendment's due process clause because it promotes a permissible public goal and yet still be an unconstitutional taking because it has significant adverse economic effects on the landowner. If this analysis is plausible, then the public would benefit during the interim period between the date on which the regulation takes effect and the date on which the regulation is rescinded or the government acquires the property through condemnation. The public should bear the costs of those benefits and the landowner should be compensated in order to place him in the same position, monetarily, as if his property had not been subjected to the regulation.

As recently as 1977, the Supreme Court reaffirmed that a land use regulation could amount to a taking.[69] This holding in turn forms the basis for the proposition that compensation must be paid for the period during which such a regulation causes a taking. On its face, the just compensation clause does not distinguish between permanent and temporary takings.[70] On the other hand, the clause does not require a governmental entity to acquire property merely because a regulation has been declared invalid. The government would retain the option either to rescind the offending regulation and pay compensation for the interim period during which the regulation "effected a taking"[71] or to condemn the property formally, to pay the full market value, and to continue the regulation in effect.[72]

A majority of the court endorsed Justice Brennan's approach in *Agins* and *San Diego*.[73] Prior to the advent of *First English*, four cases had attempted to bring the remedial issue to the court for resolution. Each time the question arose, the Court refused to consider it because either the appeal was not from a final judgment or the regulation in question did not amount to a taking.[74]

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68. Id. at 652-53, 101 S. Ct. at 1304.

69. *Penn Central*, 438 U.S. 104, 98 S. Ct. 2646 (1978).

70. Id. at 657, 101 S. Ct. at 1307.

71. Id. at 659-60, 101 S. Ct. at 1307-08.

72. Id. at 659-60, 101 S. Ct. at 1308.

73. Justice Brennan was joined in his dissent by Justice Stewart, Justice Marshall, and Justice Powell. Id. at 636, 101 S. Ct. at 1296. In a separate concurrence Justice Rehnquist indicated that, but for the lack of a final judgment, he also would have endorsed Justice Brennan's approach. Id. at 633-34, 101 S. Ct. at 1294-95.

74. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108 (1985); San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 101 S. Ct. 1287 (1981). *Agins*, 447 U.S. 255, 100 S. Ct. 2138 (1980).

THE *First English* Opinion

In *First English*, the Court finally addressed the substantive issue that it had avoided in previous decisions. In its complaint, the church alleged that the challenged ordinance denied it all use of its property and sought to recover monetary damages in inverse condemnation. The trial judge granted the defendant's motion to strike the allegations, relying on a procedural statute[75] and the rule in *Agins*. The reasoning was that since *Agins* prohibited an inverse condemnation remedy in an action for relief from a land use regulation, then the allegations had no bearing on any possible cause of action. The allegation was deemed "immaterial and irrelevant" because the church sought only damages.

By relying on the *Agins* rule, the trial court isolated the remedial issue for review.[76] The California Court of Appeals, also relying on *Agins*, upheld the trial court's decision, and the California Supreme Court denied review. Subsequently, the United States Supreme Court agreed to review the state court decision. Since the church sought only monetary damages and had appealed the trial court's decision to grant the motion to strike and, since there had been no trial on the merits of the taking claim, the remedial issue was isolated from any issue relating to the merits of the church's claim. The sole issue before the Court was whether "the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings."[77]

The United States Supreme Court's analysis was based on traditional constitutional interpretation. First, the constitutional guarantee of compensation for property taken by a government entity is "self-executing."[78] Stated another way, "[t]he form of the remedy cannot qualify the right."[79] The right to compensation is absolute once it has been determined that a taking has occurred.[80] Constitutional guarantees cannot be limited or restricted by procedural limitations imposed by a state or the federal government. Since suits for compensation are founded on the

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75. Section 436 of the California Code of Civil Procedure (West Supp. 1988) states "[t]he court may . . . [s]trike out any irrelevant, false, or improper matter inserted in any pleading."

76. *First English*, 107 S. Ct. at 2382.

77. Id. at 2385.

78. Id. at 2386 (quoting United States v. Clark, 445 U.S. 253, 257, 100 S. Ct. 1127, 1130 (1980)).

79. 107 S. Ct. at 2386 (quoting Jacobs v. United States, 290 U.S. 13, 16, 54 S. Ct. 26, 27 (1933)).

80. See also Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 5, 104 S. Ct 2187, 2191 (1984); United States v. Causby, 328 U.S. 256, 267, 66 S. Ct. 1062, 1068 (1946); Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 304-06, 43 S. Ct. 354, 355-56 (1923); Monongahela Navigation Co. v. United States, 148 U.S. 312, 327, 13 S. Ct. 622, 626 (1893).

Constitution of the United States, no statute can interfere with the seeking of compensation.

The second basis for the decision was Justice Holmes' proposition in *Pennsylvania Coal* that a regulation that "goes too far" will be "recognized as a taking."[81] The opinion repeated the well established principle that a regulation may be so excessive as to amount to a taking. Furthermore, a taking may occur before the regulation is declared invalid by a court. The Court rejected the argument that the language of *Pennsylvania Coal* should be narrowly construed so as to limit the application of the just compensation clause to cases involving physical occupation and use by a government entity.[82] The Court stated that the *Agins* decision "truncated" this rule "by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation."[83]

The opinion carefully delineates the scope of its holding. It states that compensation must be paid from the time that the regulation "effects a taking."[84] Furthermore, the holding is explicitly limited to a situation where the landowner is denied all use of his property by a regulation and does not "deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."[85]

First English only teaches that if the effects of a regulation are sufficiently excessive so that a taking results, and if the regulation achieves this status prior to a judicial declaration of unconstitutionality, then the government entity that imposed the regulation must compensate the landowner who was adversely effected. Therefore, in the future, courts must determine not only whether a taking has occurred, but also the point at which the taking began to occur.

IMPLICATIONS

Apparently, most of the formal doctrine concerning regulatory takings remains unchanged after *First English*. The opinion implies that since there is no constitutional basis for a distinction between temporary and permanent regulatory takings, then temporary regulatory taking claims are to be determined by the same standards that are applied to permanent regulatory taking claims. This suggests that there has been

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81. *Pennsylvania Coal*, 260 U.S. 393, 415, 43 S. Ct. 158, 160 (1922).

82. *First English*, 107 S. Ct. at 2386-87.

83. Id. at 2387.

84. Id. at 2389. Similar language appears in Justice Brennan's dissent in *San Diego Gas & Electric*, 450 U.S. 621, 101 S. Ct. 1287 (1981).

85. *First English*, 107 S. Ct. at 2389.

no change in the rules by which regulatory taking claims have been adjudged.

The opinion reaffirms the prior jurisprudence, which holds that the mere adoption of a regulation is not sufficient to support a taking claim. Regulatory taking claims have been brought on the grounds that the enactment of a regulation or governmental planning activity which reduced the market value of a parcel of property constituted a taking.[86] The Court has consistently recognized that such fluctuations in value are "incidents of ownership" and therefore do not constitute takings unless the landowner is deprived of all economically viable uses of his property, or unless the purpose of the enactment or activity was to reduce the value of the property in order to reduce the amount of compensation that must be paid when the property is formally condemned.[87]

Realistically, however, the injection of a temporal factor into the regulatory takings analysis may have changed the analysis for the future. The Court may be ready to recognize new grounds for finding a regulatory taking. As mentioned earlier, some state courts have allowed a damages remedy in inverse condemnation for takings that resulted from unjustified administrative delay and misconduct and from repeated denial of development permits, as well as from denial of all beneficial use of the property.[88] During the 65 years since *Pennsylvania Coal*, the Supreme Court reviewed only a few of the numerous state court decisions. Meanwhile, the state courts have sometimes interpreted the Constitution or their own state constitutions more strictly,[89] thereby widening the bases for regulatory taking claims. The recent increase in the number of regulatory taking claims reviewed by the Supreme Court indicates that the Court might be prepared to revive the takings clause. If so, then the Court can turn to the large body of firmly entrenched state court jurisprudence for guidance.

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86. Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138 (1980); Danforth v. United States, 308 U.S. 271, 60 S. Ct. 231 (1939).

87. *Agins*, 447 U.S. at 263 n.9, 109 S. Ct. at 2143 n.9; *Danforth*, 308 U.S. at 285, 60 S. Ct. at 236; *Pennsylvania Coal*, 260 U.S. at 413, 43 S. Ct. at 159.

88. See supra text accompanying notes 39-42.

89. For example, in cases where overflights have significantly decreased the value of a piece of property, federal courts have declined to award compensation unless the overflights actually penetrated the airspace over the claimant's property. Griggs v. County of Allegheny, 369 U.S. 84, 82 S. Ct. 531 (1962); United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062 (1946); Batten v. United States, 306 F.2d 580 (10th Cir. 1962). However, two state courts have awarded damages based on a "taking" caused by overflights that did not actually penetrate the airspace above the claimant's property. Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), cert. denied, 379 U.S. 989, 85 S. Ct. 701 (1965).

There are sound policy reasons why the Court should adopt a stricter application of the takings clause. Land use regulation has become pervasive. Proponents of the damages remedy for temporary regulatory takings have argued that *First English* will provide the means to curb what they perceive to be abuses of the police power and land use planning schemes. The lack of a damages remedy for temporary regulatory takings encouraged government entities to enact the most stringent regulations possible. If a successful challenge was brought and the landowner obtained declaratory relief, then the government entity would enact a similar but slightly different regulation that achieved the same effect. The landowner had to then institute new legal proceedings to challenge the new regulation. As a result, the government entity could forestall the development of certain property indefinitely while avoiding the necessity of formally condemning the property and paying compensation.[90] It has been argued that the damages remedy will not only prevent this abuse but will also encourage land use planners to more carefully weigh the costs and benefits of land use regulations and create more economically efficient regulations.[91]

Some commentators have argued that compensation for temporary regulatory takings will damage municipal treasuries and deter municipalities from enacting stringent land use regulations.[92] The availability of a damages remedy will expose municipalities to unexpected, and possibly severe, liability to landowners who bring successful regulatory taking claims.[93] The California Supreme Court in *Agins* recognized that state and local budgets already strained by federal budget cuts could

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90. Indeed this procedure was even recommended by a prominent California city attorney:

> If all else fails, merely amend the regulation and start over again. If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of Selby v. City of San Buenaventura, 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again . . . . See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.

San Diego Gas & Electric, 450 U.S. at 655-56 n.22, 101 S. Ct. at 1306 n.22 (quoting Longtin, Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation), 38B NIMLO Municipal L. Rev. 192-93 (1975)).

91. Comment, supra note 37, at 731-32. See also Sterk, Government Liability for Unconstitutional Land Use Regulation, 60 Ind. L. J. 113, 146-57.

92. Comment, supra note 37, at 726-32.

93. The damages requested by the utility in *San Diego Gas & Electric* were over three million dollars. 450 U.S. at 627, 101 S. Ct. at 1291.

be severely disrupted by large damage awards.[94] For this reason, state and local regulatory authorities may be reluctant to expose themselves to potentially severe damages liability by enacting a regulation that comes close to the constitutional limit of the police power. Since that limit is not clearly defined, planners will be wary of regulations that approach what they perceive to be the constitutional limit. As a result, enacted regulations may be less strict than constitutionally possible, and the public will be denied the benefits of more stringent regulations. Furthermore, where strict regulations are imposed, *First English* may make government entities less willing to fight a landowner's challenge and more willing to settle out of court. If a settlement results in the payment of compensation in a case where the government entity would have won in court, then the public fisc needlessly loses funds that could have been used to provide additional services or benefits.

Proponents of the damages remedy argue that the deterrence issue is largely speculative.[95] The Supreme Court has rarely found a land use regulation unconstitutional. Furthermore, the regulating authority may not owe compensation for the time during which normal administrative and judicial delays occur. The *First English* opinion left this question unanswered but stated that the questions "that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" are "quite different."[96] It is unlikely that the Supreme Court would impose liability on a municipality for the time during which the Court would refuse to hear the case because the landowner had not yet exhausted all of his state remedies.

If the Court declines to impose liability for normal delays, then regulatory authorities will not be deterred from engaging in good faith regulation of land use. This will encourage regulating authorities to allow landowners some use of the property during the period of time required for administrative and judicial consideration of the developer's request. Since all landowners are required to submit to the process, there are no investment-backed expectations during the period, other than those which arise from the use to which the land had previously been put. If the regulation avoids interfering with all possible uses, then compensation should not be awarded for normal administrative and judicial delay even if the regulation is ultimately found invalid.

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94. *Agins*, 24 Cal. 3d 266, 276-77, 598 P.2d 25, 30-31, 157 Cal. Rptr. 372, 377-78 (1979). See also Eck v. City of Bismarck, 283 N.W.2d 193, 200-01 (N.D. 1979).

95. Comment, supra note 37, at 730. It is also argued that if the fear is real then perhaps land use planners are regularly overstepping the constitutional bounds of permissible regulation.

96. *First English*, 107 S. Ct. at 2389.

If interim damages are awarded, they should only be awarded from the time at which development would have occurred in the absence of the regulation, which is when the landowner is first harmed.[97] The determination of when a regulation begins to effect a taking becomes critical. Under present regulatory takings analysis, this point is not easy to identify. Damages awarded from the point at which a permit was sought would be overstated.[98] The landowner would be compensated for a normal delay that every landowner must face. Developers effected by a regulation that might be unconstitutional would be encouraged to immediately apply for a permit in order to maximize any potential damages award.[99] Normal delays could be called incidents of ownership and therefore not implicate the takings clause.

If damages are awarded from the point at which the permit is first denied, then the developer is encouraged to proceed with alternative development plans that are less profitable while pursuing a regulatory taking claim. If the regulation is found to be unconstitutional and if the alternative development is irreversible, then the landowner would seek compensation for the permanent reduction in profit. This could result in large damages awards for loss of profits over the life of the alternative development.[100] Regulating authorities might be forced to make monthly payments to landowners because unconstitutional regulations caused the landowners to undertake development plans which generate less profits for the landowner, plans which also produce lower tax revenues for the municipality.[101]

Awarding damages from the point at which all administrative appeals and requests for variances are denied suffers from the same types of problems. After exhausting all local procedures, the landowner has an incentive to proceed with irreversible development plans while pursuing federal appeals. The potential damages from the time required for the appeals process may cause landowners to pursue appeals that they otherwise would not pursue. Landowner appeals, even where unsuccessful, would cause state and local governments to expend funds on legal fees, funds that could be used in other ways more beneficial to the public. In addition, if the regulation is invalid then it has essentially effected a taking from the moment that development would have occurred in the absence of any regulation. If the regulation prevented the developer from proceeding with his project, then the developer should be compensated for any and all losses that occurred due to the imposition of

97. Sterk, supra note 90, at 135 n.112.
98. Id.
99. Id.
100. Id.
101. Id.

the invalid regulation. The courts should make no distinction between losses suffered prior to the exhaustion of administrative appeals and remedies and those losses suffered thereafter.

CONCLUSION

The temporary takings remedy does not complement all measures of regulatory taking. It is most compatible with a violation of the fifth amendment that deprives an owner or developer of all use of his property, because that type of regulatory effect is very similar to the effects of temporary physical invasion and occupation. The application of the temporary taking concept to other forms of taking is more complex.

The Supreme Court has never found a taking unless the regulation has deprived the owner of all economically viable use of his property. However, state courts have often found a taking where the value of the property was only diminished.[102] The application of the remedy for temporary takings will be most difficult in situations where the value of the property is greatly reduced but not completely destroyed.

The holding in *First English* is based on fundamental constitutional principles and, as such, it should be applied to all types of regulatory takings. Therefore, if a landowner is denied permission to construct his first choice of development but instead mitigates his damages by proceeding with alternative development plans that are less profitable, then the courts should calculate damages using a time factor that reflects the life of the investment pursued. The calculation of compensation should not make any distinction between takings by deprivation of all beneficial use for a finite period of time and takings by reduction in value in perpetuity. If a perpetual reduction in value occurs because of a taking, then the compensation could be infinite. This is a very disturbing prospect for any municipality.

The temporary taking concept conflicts with the "bundle of rights" theory of regulatory taking. Particular property rights can be broken into time segments. The deprivation of the right during a particular time segment is merely the loss of one strand in the bundle. A conflict occurs because the Court has previously stated that it will not look to the effect on individual segments or strands in the bundle of rights to determine if a regulation has created a taking. However, the temporary

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102. State v. Johnson, 265 A.2d 711 (Me. 1970); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963); Oooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964); Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964); Thornburgh v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962).

taking remedy is analogous to compensation for the destruction of one strand in the bundle.

First English brings together two concepts that previously were considered distinct. It applies a form of the physical invasion rule to regulatory takings and introduces a segment by segment examination of all affected rights. The opinion declares that compensation for a taking is an absolute right. The court then limits the *First English* holding to a situation where the landowner is deprived of all use of his property. However, if the right to compensation is absolute, then all temporary takings must be compensated.

There are serious disadvantages connected with the computation of temporary damages. Significant problems are evident whether liability starts at the point when the ordinance is adopted or at the point when it is enforced. A damages remedy works best when the type of conduct sought to be deterred is specifically defined. Since the constitutionality of borderline regulations is highly uncertain, the degree of deterrence is likewise uncertain. It is very difficult and perhaps unfair to punish municipalities for erroneous judgment calls made in good faith. We do not need a temporary taking damages remedy for purposeful delay. Such delay could be compensated as a violation of procedural due process.[103] Bad faith delay should be recognized as a violation of due process, not a taking of private property. Therefore, the court should narrowly confine the damages remedy for temporary takings. It should be limited to cases where the regulation has deprived the landowner of all beneficial use of his property or created some effect analogous to a physical invasion and occupation.

Alfred R. Gould, Jr.

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103. A damages remedy would be available under 42 U.S.C. § 1983.